Filed 2/25/05 Skistimasv. Old World Owners Assn. CA4/3 CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ALFRED SKISTIMAS, Plaintiff and Appellant, v. OLD WORLD OWNERS ASSOCIATION et al., Defendants and Appellants.	G032915 (Super. Ct. No. 01CC14783) O P I N I O N

Appeals from a judgment and an order of the Superior Court of Orange County, Derek W. Hunt, Judge. Affirmed in part and reversed and remanded in part.

Law Offices of Alexandria C. Phillips and Alexandria C. Phillips for Plaintiff and Appellant.

Fiore, Racobs & Powers, Janet L.S. Powers, and C. Mark Hopkins for Defendants and Respondents.

* * *

Alfred Skistimas sued the individual members of the board of the Old World Owners Association (the Association) for violating certain provisions of the covenants, conditions and restrictions (CC&Rs), which allegedly had a negative effect on his business. He also claimed the board members slandered him and threatened to force him out of the Old World Village (the Village), and he alleged one board member threatened to shoot him. Skistimas also sued the Association, claiming it selectively enforced the CC&Rs, breached its fiduciary duty to him, failed to supervise individual board members, and slandered him.

The trial court summarily adjudicated some causes of action, granted motions for judgment on others (Code Civ. Proc., § 631.8),[1] and ultimately entered judgment against Skistimas on the entire complaint. It awarded attorney fees and costs to the defendants, but denied their request for expert witness fees under section 998. Skistimas appeals from the judgment, and the individual defendants appeal from the denial of expert witness fees. We affirm the judgment but reverse the denial of expert witness fees.

FACTS

Second Amended Complaint

Skistimas owned property and operated the Edelweiss Inn (the Inn) in the Old World Village in Huntington Beach. This development, built in the mid-seventies, was based on the concept that each lot would consist of a lower level "craft shop" with a residential unit above it. The CC&Rs required the residential unit to be occupied only by the person who either owned or operated the shop below it.

Skistimas complained that inadequate parking was destroying his business. Pleading causes of action for breach of the CC&Rs, breach of fiduciary duty, declaratory relief, nuisance, and defamation, he sued the Association and the individual board members: Inge McKellop, Bern Bischof, Ursel Petermann, Kent Schlick, Phil Larschan,

[1] All statutory references are to the Code of Civil Procedure unless otherwise specified.

Jim Haskett,[2] Jack Merritt, and Michael Hermanns. Skistimas alleged that some or all of the individual defendants rented their property "to persons who did not conduct business in the commercial unit below the residential unit . . . thereby usurping parking spaces"; refused to "remove the green painted parking curb signage in front of Skistimas's Inn which restricts parking times to 20 minutes"; parked in front of his Inn for "periods of more than 24 hours"; interfered with his rights to speak and vote at Association meetings; refused to accept his Association dues; refused to spend the advertisement assessment to advertise the Inn; "us[ed] the board of director meeting minutes to defame Skistimas by stating that [he] threatened to 'kill the board members' if they foreclosed his Property"; announced to the Village members "that the Board was going to force Skistimas out of the Village; and removed Bischof "from being a board officer because he engaged in business with Skistimas."

The complaint further alleged that McKellop, Hermanns and Bischof used the common areas for commercial purposes, thus precluding patrons of the Inn from finding parking. Merritt allegedly rented his commercial unit to a contracting business, not a "craft-shop" business, and also threatened to shoot Skistimas. Schlick allegedly engaged in self-dealing by contracting with the Association to make Association repairs and maintenance and used Skistimas' electricity for the common areas.

Motions for Summary Judgment

One month before trial, the individual defendants brought motions for summary judgment or summary adjudication. The trial court granted summary adjudication on the cause of action for breach of the CC&Rs in favor of all individual defendants except Merritt, finding either the acts alleged were not in violation of the CC&Rs or the defendants had proved a defense. It found Skistimas had not made a prima facie case for the existence of a fiduciary relationship and granted summary adjudication in favor of all individual defendants on the cause of action for breach of

[2] Haskett died during the litigation and was dismissed.

fiduciary duty. On the nuisance cause of action, the trial court noted that all the individual defendants except Bischof and Hermann denied parking in front of the Inn; because Skistimas did not present any facts to controvert the denials, the trial court granted summary adjudication in favor of all individual defendants except Bischof and Hermann on the nuisance cause of action. The trial court denied summary adjudication of the causes of action for declaratory relief and defamation.

Trial

The case went to trial before the court in June 2003. After Skistimas presented his case, the defendants moved for judgment under section 631.8 [motion for judgment by defendant after the close of plaintiff's case]. Skistimas agreed there was no evidence presented that anyone other than Schlick and the Association participated in saying Skistimas threatened to murder the board members; thus, the motion for judgment was granted on the defamation cause of action for all defendants except the Association and Schlick. The motion was also granted in favor of Merritt on the cause of action for breach of the CC&Rs because Skistimas agreed there was no evidence to support his alleged breach.

The defendants presented their cases on the causes of action for breach of the CC&Rs and breach of fiduciary duty against the Association; declaratory relief against all defendants; nuisance against the Association, Bischof and Hermann; and defamation against the Association and Schlick. The trial court ruled in favor of all the defendants, commenting that Skistimas's testimony "was unreliable in that it was vague and it was speculative and it was offered without foundation." The court found Schlick's statement about Skistimas threatening the board members was defamatory and was made at the Association meeting in February 2000. But it found the cause of action against Schlick for slander was barred by the one-year statute of limitations. The court also

found against Skistimas on the defamation cause of action against the Association: "I do not have a preponderance of the evidence that the Association published the minutes."

The trial court found the Association had not breached the CC&Rs or its fiduciary duty because there was no evidence it "violated its business judgment in dealing with parking, in dealing with advertising, permitting the festivals, or removing Mr. Bischof . . . ." The court found Skistimas was "delinquent in his assessments and thus not entitled to vote. . . . [¶] [T]here has not been a preponderance of the evidence that Mr. Skistimas was prevented from speaking at an open forum, and the board is otherwise entitled to run its meetings in an orderly fashion, meaning that it can insist upon silence during other times in the meetings. It is simply good governance."

The Association had petitioned the superior court for authority to amend its CC&Rs so as to eliminate the "upstairs/downstairs restriction"; the petition had been granted by another superior court judge in 2001. The trial court found any cause of action based on a violation of that restriction was "completely moot." For the same reason, the court declined to "issue a [d]eclaration on the upstairs/downstairs provision of the CC&Rs." Furthermore, the court stated, "[T]he craft-shop question is too ambiguous to suggest that there was any fiduciary breach by the board of directors in terms of what that provision means or meant. . . . [N]obody knows exactly what the provision means, but everybody seems to think that it doesn't mean a motel."

The court described the nuisance cause of action as "exclusively random incidents about discrete violations of parking in front of or nearby the motel." The evidence was insufficient to establish a conspiracy by the board, and without such a plan, the incidents of parking were "completely de minimus . . . ."

Skistimas made a motion for new trial on the cause of action for defamation against Schlick, claiming "Schlick's slanderous statement to the board was made outside of Skistimas's presence and was not made known to Skistimas until the summer or fall of 2001 when the Association finally provided . . . his counsel[] with copies of the 1998-

2001 board meeting minutes. . . ." Skistimas also claimed a new trial on the defamation cause of action against the Association was justified because the evidence established the slander was published to board members McKellop and Bischof, who were not present at the meeting where the statement was uttered but received the minutes in their board packets for the next month. The trial court denied the motion.

Motion for Costs

The defendants moved to recover attorney fees as the prevailing party in an action involving the enforcement of CC&Rs. (Civ. Code, § 1354, subd. (f).) The trial court found them to be the prevailing parties and awarded them $57,630. The individual defendants also moved to recover their expert fees because Skistimas refused to accept their offers to settle and failed to achieve a better result at trial (§ 998). The trial court noted only the individual defendants had made settlement offers to Skistimas, not the Association, and it found the offers were not "'token' or 'bad faith' offers." But the court denied the motion because none of the defendants paid "out of pocket" for the experts. "My inspection of the CCP 998 offers shows that those offers were expressly made, not by the individuals themselves, but by the community association's insurance carrier on behalf of those individuals."

DISCUSSION

Summary Adjudication

Skistimas first contends the trial court erred in granting summary adjudication on the causes of action for breach of contract and nuisance against the individual defendants. He argues the evidence establishes a triable issue of fact regarding whether the individuals publicly threatened to force him out of the Village. He claims this behavior constitutes a breach of contract because it violates Article X, section 3 of the CC&Rs: "No noxious or offensive activity shall be carried on, in or upon any Lot or the Common Area, nor shall anything be done therein which may be or become an

annoyance or nuisance to other Owners." He further claims the behavior also constitutes a nuisance because it is "injurious to health, . . . or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property . . . ." (Civ. Code, § 3479.) We disagree.[3]

A party moving for summary adjudication on a cause of action bears the burden of persuasion that there is no triable issue of material fact and it is entitled to judgment as a matter of law. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) Moving defendants can meet this burden by showing "one or more elements of the cause of action, even if not separately pleaded, cannot be established, or [that] there is a complete defense to that cause of action." (§ 437c, subd. (p)(2).)

If the moving defendants meet this burden, it shifts to the plaintiff, who must then establish a triable issue. (*Aguilar v. Atlantic Richfield*, *supra*, 25 Cal.4th at 849.) To defeat a motion for summary adjudication, the plaintiff must set forth "specific facts" showing a triable issue exists as to that cause of action or defense. (*Ibid.*) A triable issue cannot be established solely by reliance on allegations or denials in the pleadings or by assertions based on conjecture or speculation. (*Ibid.*; *Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 807.) On appeal from an order of summary adjudication, we review the moving and responding papers de novo. (*Id.* at 805.)

The individual defendants unequivocally denied having "announce[d] to the membership that Mr. Skistimas was going to be 'forced out of the Village.'" In opposition, Skistimas declared, "Bischof and the Board announced to the Village members that the Board was going to force me out of the Village." Skistimas' declaration was not sufficient to raise a triable issue of fact. He merely repeated the

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[3] The trial court did not grant summary adjudication to Merritt on the breach of contract cause of action because Merritt did not refute Skistimas' allegations that he violated the CC&Rs by renting to a "non-'craft shop' enterprise."

allegation in his complaint without any supporting facts. "The plaintiff . . . may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action . . . ." (§ 437c, subd. (p)(2).) The statute requires the plaintiff to produce the evidence "by which he will, someday, when the time comes, at the time of trial, eventually, be able to make a prima facie case." (*Golden Eagle Refinery Co. v. Associated Internat. Ins. Co.* (2001) 85 Cal.App.4th 1300, 1314-1315.)

Breach of CC&Rs

Skistimas next contends the evidence at trial does not support the judgment in favor of the Association on the cause of action for breach of the CC&Rs.[4] He claims the evidence shows the Association selectively enforced the provision that prohibited renting to non-resident tenants, thus constituting a breach.

The 2001 amendment to the CC&Rs provides: "The Owner-Operator may, but need not, operate the Shop. The Owner-Operator may, but need not, occupy the Residence. The Resident occupant may, but need not, also operate the Shop. The Shop Operator may, but need not, also reside in the Residence. Owners may lease the Shop space separately from the Residence space to different tenants." The Association petitioned the superior court for an order reducing the percentage of affirmative votes necessary to pass the amendment, which the court granted "upon the condition that the Association also comply with any requirements imposed by the City of Huntington Beach concerning the occupancy of any applicable upstairs residential unit by persons other than those persons occupying the downstairs shop in the same unit."

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[4] Skistimas argues the evidence also does not support the judgment in favor of the individual defendants, citing testimony at trial. All but Merritt, however, had been successful in their motions for summary adjudication before trial. And Skistimas agreed Merritt's motion for judgment should be granted.

Richard Lewis, a Village resident and former board member, testified there were several attempts between 1989 and 2001 to eliminate the upstairs/downstairs restriction. They all failed, however, because the CC&Rs required a vote of 75 percent of the members to amend. After petitioning the court, the percentage was reduced to 66.6 percent, and the amendment passed in 2001.

The trial court found the amendment rendered the cause of action for breach of contract against the Association moot. "It is a subject matter in which the plaintiffs obviously are shopping for a more favorable judge than Judge McEachen, who has it on his inventory. This is not my business. If you have a problem with that, that is the place to go. He has got that problem."

Skistimas also claims the Association violated the CC&Rs by failing to enforce the signs in front of his Inn limiting the time people could park there. Schlick testified that in 1991, the Association allowed the former owner of the Inn "to put unenforceable signs on the parking lot sign of building 46 that restricts parking for motel use only." Later, there were some areas where the curbs were painted green and parking was limited to one hour in order to discourage people from staying there a long time. "[If] somebody didn't park in it because they saw the sign and they were going to obey it, that would be taking care of our problem of somebody being able to run in and run out. It might free up one or two spots for people to get in and out of the Village." But the restrictions were unenforceable because "all of the common area parking is common area, and nobody – nobody has claim to any one individual parking spot in the Village." The Association had the authority to tow cars away only after they had been left unattended for 72 hours.

The trial court acknowledged that parking was a problem at the Village but found that parking enforcement was not a subject of the CC&Rs. "[I]t is certainly not clear what the Board has done in violation of the CC&Rs."

Fiduciary Duty

Skistimas contends the evidence is insufficient to support the judgment in favor of the Association on the cause of action for breach of fiduciary duty. He claims the evidence compels the conclusion that the Association breached its fiduciary duty to him by selectively enforcing the upstairs/downstairs restriction; allowing McKellop and Bischof to use common areas for commercial purposes, thereby decreasing parking; and allowing board members to violate the craft shop restriction.

Inge McKellop, a Village resident and former board member, testified the board and the residents had struggled with the upstairs/downstairs issue and the "craft shop" restriction for years and had sought the advice of counsel regarding the enforceability of these CC&R provisions. Counsel advised the Association "that it would not be enforceable because it hasn't been enforced for – well, at that time, 23 years, and that it would have a negative effect on the homeowners." She explained, "When we first opened [in 1978], we used to wear German dirndls and lederhosen and ha[ve] parades, and most of the shops were retail at that time. And then through the years, as people retired, got ill, the families got bigger, people had to move out for various reasons, it was difficult, at best, to find another tenant or another owner who would be able to live upstairs and run their business downstairs. So consequently, a lot of the businesses stayed empty – or tried to get retail businesses in which were not that beneficial for the Village itself. They were not in line anymore with the old European craft shop, mom-and-pop-type store. Those places didn't do well. . . . [¶] So instead of having

predominantly retail shops, now we have half services. . . . So the business has gone down considerably."

McKellop testified that it was the special events that brought people to the Village, not "the cobblestone streets and Bavarian architecture." She explained that the parking lot bordering the Inn also bordered "the church, the Rothaus, and the restaurant/festival hall. And that is smaller than our west parking lot. So consequently, that lot gets filled quickly. That is where the events are held. The weddings go there." [¶] . . . [¶] We wish that the parking lots were full with event people every day" because those people patronized the other shops.

The trial court found the Association did not breach any fiduciary duties to Skistimas; rather, it properly used its business judgment in dealing with the parking, the craft shop and upstairs/downstairs restrictions, and the special events. The evidence supports this conclusion.

Defamation

Skistimas contends the evidence shows that Schlick defamed him by announcing at the homeowners' meeting that Skistimas was going to kill the board members if they foreclosed on his property. We disagree.

In February 2000, Skistimas was delinquent in the payment of his association dues, and the Inn was subject to foreclosure. Several witnesses testified that Vera Wise told them Skistimas intended to kill five board members if the foreclosure went through. The property manager, Sherrie Thompson, called Schlick, who was the board president at that time, out of concern for the board members' safety. At the board meeting on February 23, "[t]he board discussed . . . hiring a security guard on the day that the motel was expected to be foreclosed. They were concerned not only for themselves, but for everyone else in the building." The minutes of the meeting state: "Ken Schlick

began the meeting by alerting the Board that Alfred Skistimas has been overheard threatening to kill five members of the Association if the board foreclosed on his motel." Skistimas testified he was present at that meeting but did not hear the statement.

During closing argument, Skistimas's counsel argued the statute of limitations did not apply to the slander cause of action, stating "[Skistimas] asked for the board minutes over and again and he never received them." The trial court responded, "He said he was at the board meeting where this libel or slander was repeated. He testified to that. So he was sitting right there." Counsel continued to stress that Skistimas had not received a copy of the minutes until just before the lawsuit was filed. The trial court replied, "What difference does it make, since he was a witness to the slander himself [¶] sitting right there at the board meeting?" Counsel responded, "He didn't know it was published, I guess, in the board minutes is my comment, Your Honor."

The trial court found that the statement was defamatory, it was made by Schlick, and the defendants did not prove the defense of truth. "But I do not have a preponderance of the evidence that the Association published the minutes. Therefore, . . . I find for the Association on that cause of action." The court found the cause of action against Schlick was barred by the one-year statute of limitations. Schlick made the statement in February 2000, "and Mr. Skistimas testified, as I noted a few minutes ago, that he was present at the meeting when this was brought up and heard the statement." The lawsuit was not filed until November 2001.

Skistimas moved for a new trial, attaching his declaration stating he had testified he was present at the February 2000 meeting but did not hear Schlick's defamatory statement. The trial court stated its trial notes indicated Skistimas testified "he had been present [at] the February 23rd [2000] Board meeting and been a witness to the repeated defamation when it occurred." No reporter's transcript had been submitted with the motion, forcing the trial court to rely on its notes rather than Skistimas's "post-

trial declaration about what he said at the trial." Based on its understanding of Skistimas's testimony, the trial court concluded that the statute of limitations on the cause of action for slander against Schlick had expired in February 2001 and denied the motion for new trial.

The record reveals, however, that Skistimas did testify he had not heard Schlick's statement even though he was present at the February 2000 meeting. The trial court incorrectly remembered Skistimas's testimony, as evidenced by its dialogue with Skistimas's counsel during closing argument. But Skistimas's counsel did not attempt to correct the court's mistake. Rather than arguing Skistimas's discovery of the slander was delayed because he did not hear it, counsel argued the statute of limitations did not begin to run until Skistimas read the minutes. Skistimas did try to correct the trial court's mistake by bringing a motion for new trial. But he failed to attach the reporter's transcript, leaving the trial court to rely on its notes. Given the evidence before it, the trial court did not abuse its discretion in denying the motion for new trial.

On appeal, however, this court reviews the entire record to determine if there is sufficient evidence to uphold the judgment. (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632.) Skistimas argues if we disregard the trial court's misapprehension that he was present at the meeting and heard Schlick utter the slander, there is insufficient evidence to support the finding that the cause of action against Schlick was barred by the statute of limitations. This may be true, but we are not limited to the statute of limitations as the only means to uphold the judgment. If the judgment is correct on any ground, we will uphold it despite the trial court's erroneous reasoning. (*Day v. Alta Bates Medical Center* (2002) 98 Cal.App.4th 243, 252, fn. 1; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 1997) ¶8:214, p. 8-128.)

Schlick's statement to the membership of the Association was conditionally privileged as a communication to interested persons. Civil Code section 47,

subdivision (c) provides that a communication is privileged if in is made "without malice, to a person interest therein . . . by one who is also interested . . . ." This privilege protects a "narrow range of private interests" among closely related parties such as "a family, business, or organizational interest." (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 727.) Schlick's announcement that an Association member intended to kill the board members was clearly of interest to the Association members at large. The privilege does not protect communications among interested persons if the communication was made with malice. But it was Skistimas's burden to prove Schlick spoke with malice (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1203); he failed to carry that burden.

Skistimas also contends the trial court erroneously determined the Association had not defamed him by publishing Schlick's statement in the board minutes. He claims the evidence established the slander was published to board members McKellop and Bischof, who were not present at the meeting where the statement was uttered but received the minutes in their board packets for the next month. He also claims the Association published the minutes by distributing them to his attorney before litigation commenced. He is wrong.

The distribution of the minutes to Skistimas's attorney is absolutely privileged under the litigation privilege (Civ. Code, § 47, subd. (b)) because Skistimas demanded to see the minutes in preparation for litigation. "Much as the litigation privilege has escaped from the initial confines of defamation and publication, so, too, has the privilege been affixed to matters beyond the courtroom. Thus, the filing of a lis pendens with the county recorder is privileged [citation], as are demand letters sent prior to litigation [citation], threats associated with settlement negotiations [citation], and an attorney's tortious solicitation of potential plaintiffs [citation]. There are apparently no fixed temporal or geographical limitations as long as there is 'some relation' to a judicial

proceeding contemplated or extant. [Citation.]" (*Drum v. Bleau, Fox & Assoc.* (2003) 107 Cal.App.4th 1009, 1023-1024.)

The distribution of the minutes to the absent board members is protected under the privilege for communications between interested persons, discussed *ante*.

Attorney Fees

Skistimas contends the trial court abused its discretion by awarding attorney fees to the Association and the individual defendants, once again claiming they violated the CC&Rs and failed to act in good faith. The circularity of this argument is obvious. The trial court found no bad faith and no breaches of the CC&Rs by the defendants.

An award of reasonable attorney fees is authorized by Civil Code section 1354, subdivision (c), which provides that the prevailing party in an action to enforce the CC&Rs of a common interest development shall be awarded reasonable attorney's fees and costs. Furthermore, because the CC&Rs contained an attorney fee clause, the defendants are entitled to an award of reasonable attorney fees as the prevailing party on a contract. (Civ. Code, § 1717, subd. (a).) Skistimas does not challenge the amount of the award as unreasonable.

Expert Witness Fees

The individual defendants contend the trial court erred in denying them an award of expert witness fees pursuant to Code of Civil Procedure section 998. The trial court denied the award because the Association's insurer made the offers on behalf of the individuals. "Unless the Association itself offered to settle in a good-faith settlement offer and still had to pay these guys . . . I don't see how they can piggyback on the individual defendants. It just doesn't seem fair to me." The individual defendants claim they were entitled to such an award even though the fees were paid by the Association's insurer rather than by the defendants themselves. We agree.

Code of Civil Procedure section 998 provides that a written settlement offer may be made by any party up to 10 days before trial. "If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his or her postoffer costs and shall pay the defendant's costs from the time of the offer. In addition, . . . the court or arbitrator, in its discretion, may require the plaintiff to pay a reasonable sum to cover costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the defendant." (§ 998, subd. (c)(1).)

While we are unaware of precedent involving expert witness fees, there is ample case law holding that a litigant may recover attorney fees even though he has not paid for them out of his own pocket. "Modern jurisprudence does not require a litigant seeking an attorney fee award to have actually incurred the fees. '[I]n cases involving a variety of statutory fee-shifting provisions, California courts have routinely awarded fees to compensate for legal work performed on behalf of a party pursuant to an attorney-client relationship, although the party did not have a personal obligation to pay for such services out of his or her own assets.' (*Lolley v. Campbell* (2002) 28 Cal.4th 367, 373.) Moreover, the court noted: 'The right of a party to seek an award of statutory attorney fees is not equivalent to a right to retain such fees.' (*Id.* at p. 373, fn.4.)" (*Moran v. Oso Valley Greenbelt Assoc.* (2004) 117 Cal.App.4th 1029, 1036.)

Skistimas points out section 998 specifically includes the requirement that expert witness fees be "actually incurred," while the statutes allowing the recovery of attorney fees do not. He argues this distinction is dispositive, urging us to interpret the phrase "actually incurred" to mean, "*personally* incurred." We decline to do so. The statute contains no requirement that any particular person must have incurred the expert witness fees, just that the fees must have been actually incurred. Thus, there is no statutory language to support treating expert witness fees under section 998 differently

than attorney fee awards. Whether the individual defendants paid the fees out of their own pockets or their insurer paid the fees on their behalf should not be determinative of their right to recover those fees.

Section 998 provides that the court has the discretion whether to make an award of expert witness fees, but the court here denied the award for an erroneous reason. The record does not reflect that the court exercised its discretion over the propriety of the award, nor did it determine whether the requested amount was reasonable. For these reasons, we remand the matter to the trial court for further determination on the expert witness fee award.

DISPOSITION

The judgment against Skistimas and in favor of the defendants is affirmed. The order denying an award of expert witness fees to the defendants is reversed and the matter is remanded to the trial court for further proceedings. Defendants are entitled to costs on appeal.

SILLS, P. J.

WE CONCUR:

O'LEARY, J.

MOORE, J.